American Benefit Corporation *and* Teamsters Local Union No. 505, affiliated with The International Brotherhood of Teamsters. Cases 9–CA–44679 and 9–CA–44701

January 8, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 2, 2009, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed a limited exception, a supporting brief, and an answering brief. The Charging Party Union also filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order.[3]

We affirm the judge's finding that the Respondent violated Section 8(a)(5) of the Act by unilaterally transferring bargaining unit work to offsite temporary employees without notifying the Union or providing it with an opportunity to bargain. In particular, we agree with the judge that the Respondent failed to prove that the Union made a "clear and unmistakable waiver" of its statutory right to bargain about this mandatory bargaining subject.[4] We also adopt the judge's finding that the Respondent violated Section 8(a)(5) by refusing to provide certain information and delaying in providing other information requested by the Union about this unilateral action.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Benefit Corporation, Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, ___F.3d___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his limited exception and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Cardi Corp.*, 353 NLRB No. 97, slip op. at 1 fn. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

[4] For the reasons set forth in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Respondent's contention that a "contract coverage" test should apply lacks merit. The Respondent's exceptions to the judge's rejection of its waiver defense challenge only the judge's interpretation of art. 31 in the parties' bargaining agreement and his interpretation of a June 2006 memorandum of understanding. The Respondent does not except to the judge's finding that neither the contractual management-rights clause nor a zipper clause prove waiver.

Member Schaumber adheres to the position that the Board should apply a "contract coverage" test, but he acknowledges that the "clear and unmistakable waiver" standard is extant Board law and applies it for the purpose of deciding this case. See, e.g., *Cardi Corp.*, supra, 353 NLRB No. 97, slip op. at 1 fn. 5. In his view, the judge's finding of an 8(a)(5) refusal-to-bargain violation on the facts of this case is consistent with the manner in which the Board has inferred ambiguity from perceived inconsistencies in contractual provisions under the "clear and unmistakable waiver" test. See *California Offset Printers*, 349 NLRB 732 (2007) (Member Schaumber dissenting). As he has stated previously, Member Schaumber would eschew the clear and unmistakable waiver test in cases such as this, where the parties have in fact bargained over the subject in question, and would instead apply the contract coverage approach endorsed by the District of Columbia Circuit. Moreover, were he writing on a clean slate, he would, even applying a clear and unmistakable waiver test, find that the parties' explicit contract language authorizing the use of temporary workers constituted such a waiver. However, as demonstrated by the contractual interpretation in *California Offset*, the Board's slate is not clean. In light of that precedent, he adopts the judge's interpretation for institutional reasons.

Chairman Liebman agrees with Member Schaumber that the judge correctly applied the Board's "clear and unmistakable waiver" test, consistent with precedent. In reply to her colleague's assertions, Chairman Liebman emphasizes the judge's cogent discussion of the obvious tension between art. 31 and the MOA, which creates ambiguity without it being unnecessarily inferred. She would reach the same result here even applying the "contract coverage" test.

[5] There are no exceptions to the judge's finding that the Respondent did not unlawfully fail to provide certain information that did not exist, or to his implicit finding that the Respondent did not unlawfully fail to inform the Union that the information did not exist.

Dated, Washington, D.C. January 8, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Julius U. Emetu, II, Esq., for the General Counsel.
Michael E. Estep, Esq. (Jenkins Fenstermaker, PLLC), of Huntington, West Virginia, for the Respondent.
George N. Davies, Esq. (Nakamura, Quinn, Walls, Weaver & Davies LLP), of Birmingham, Alabama, for the Charging Party.

DECISION[1]

Introduction

DAVID I. GOLDMAN, Administrative Law Judge. This matter concerns (1) an employer's transfer of bargaining unit work to temporary nonunit employees, and (2) the employer's failure to timely provide information requested by the employees' union about the transfer of work and hiring of the temporary employees.

American Benefit Corporation (ABC or the Respondent) performs claims processing and third-party administrator and actuarial work for a variety of pension and health and welfare funds from its offices located in and near Huntington, West Virginia. For many years its employees have been represented by Teamsters Local 505 (Union or Charging Party).[2] The most recent and current collective-bargaining agreement (the 2006 Agreement) was effective June 9, 2006, and is scheduled to terminate no earlier than June 8, 2011. ABC employs approximately 35 union-represented employees.

In October 2008, ABC temporarily hired seven nonbargaining unit employees to work offsite and sent claims processing—typical bargaining unit work—to them to perform. Five of the employees—primarily employed by another claims processing company in Huntington—worked one weekend from their primary employer's facility to perform dental claims work for ABC. Two other employees, one in Maryland and one in Illinois, were hired by ABC and performed medical claims work on their computers from their homes for up to 30 days, into mid-November.

There is no serious dispute about the basic facts. ABC sent this work to these employees without advance notice to the Union, and there was no realistic opportunity to bargain. But ABC claims the terms of the collective-bargaining agreement permit it to take this action unilaterally, without notice or providing an opportunity to bargain. The Union does not agree. It grieved ABC's use of the nonbargaining unit employees to perform this work, but ABC refused to process the grievance on procedural grounds. In addition, ABC did not, in the Union's view, adequately respond to a request for information concerning this matter.

STATEMENT OF THE CASE

On November 7, 2008, the Union filed a charge with Region 9 of the National Labor Relations Board (Board) alleging unfair labor practices under the National Labor Relations Act (the Act) against ABC. The charge was docketed by Region 9 as Case 9–CA–44679. An amended charge was filed November 19, and again on December 1, 2008. The Union filed a second unfair labor practice charge with Region 9, docketed by the Region as Case 9–CA–44701, on December 1, 2008. By order dated February 9, 2009, the Regional Director for Region 9, acting on behalf of the Board's General Counsel, consolidated the two cases and, based on the Union's unfair labor practice charges, issued a consolidated complaint alleging that ABC had violated the Act. According to the Government, ABC's unilateral provision of work for the approximately 30-day period to nonunit employees, and ABC's failure to provide requested information to the Union, were violative of Section 8(a)(5) and, derivatively, Section 8(a)(1) of the Act. ABC filed a timely answer to the consolidated complaint denying all violations of the Act.

This dispute was heard in Huntington, West Virginia, on April 28 and 29, 2009. Counsel for the General Counsel, the Union, and the Respondent, filed briefs in support of their positions on June 3, 2009. On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, ABC admits, and I find, that ABC maintained an office and place of business in Huntington, West Virginia, at which it engaged in the business of providing claims processing services for medical, dental, and pension benefit claims. The complaint further alleges, ABC admits, and I find, that in conducting its operations, in the last 12 months ABC purchased and received at its Huntington facility goods valued in excess of $50,000 directly from points outside the State of West Virginia. The complaint further alleges, ABC further admits, and I find, that at all material times ABC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that these disputes affect commerce and that the Board has proper jurisdiction of these cases, pursuant to Section 10(a) of the Act.

[1] At the hearing, on my own motion, I amended the caption to state that correct name of the Respondent.

[2] Specifically, the union-represented bargaining unit recognized by ABC is composed of all employees employed by the Employer at its Huntington, West Virginia location, but excluding all managerial employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

ALLEGED UNFAIR LABOR PRACTICES

Facts

A. The Temporary Transfer of Work in October 2008

In September 2008,[3] ABC found itself significantly behind in its processing of certain claims. Of particular concern were claims from two of the groups administered by Anthem, the PPO provider for three health care groups for which ABC served as third-party administrator. Together, the three Anthem funds constitute 75–80 percent of ABC's revenues. These claims had begun accumulating during the summer when two groups were added to ABC's workload, including one, the Fourth District that had in years past been ABC's largest group in terms of medical claims. At some point in October—on brief (R. Br. at 7) the Respondent asserts that it was mid-October, but the record is unclear—a representative from Anthem contacted Ryan Jones, ABC's CFO, expressing concern over the claims backlog. Jones agreed with Anthem that ABC would significantly reduce the backload within the next 30 days. In addition, ABC became aware that a backlog for dental claims, which tend to increase in summer months, had grown significantly since July or August.

In an effort to devise a way to bring the backload of claims down, ABC offered overtime opportunities to currently working bargaining unit employees. Only one employee signed up for overtime.[4] ABC held a meeting with employees on Thursday, October 9, to try to encourage employees to accept overtime for the coming weekend.

The meeting did not go well. Jones and ABC's Director of Human Resources Patty Bostic told employees that "the Company was in a bad position" and needed to get more claims processed, and was 60 days behind in claims processing. Employees reacted angrily. Many voiced outrage that they were being asked to work overtime when employees laid off in past months and years had not been reinstated. The meeting brought to the fore that a number of employees were refusing to sign up for overtime because of these concerns. In addition, the fact that a September layoff had occurred the day after a lavish party celebrating the Company's 60th anniversary added to some employees' frustration.[5]

At the meeting, employee and Union Steward Sheila Lusk reiterated her belief to Jones—in a reprise of a charge she had made several times in the recent past—that management was "stealing" work from employees. This suspicion over the transfer of work from the bargaining unit had been a continuing concern with some employees, particularly Lusk, since ABC had been purchased by its new owner Bill Eastwood in early 2007. Jones had repeatedly denied the charge, and denied it again at the October 9 meeting. Lusk was disciplined for her role in the meeting and the Union filed a grievance over it. The exact nature of the discipline is not clear from the record but seems to have involved Lusk's comments during the October 9 meeting. Notably, the evidence suggests—and several witnesses testified about the October 9 meeting, and about when they learned about the hiring of temporary employees—that at this meeting ABC did not mention the prospect of hiring offsite nonbargaining unit employees.

In any event, the employees' unwillingness to sign up for overtime did not last long. When Union President and Business Agent Dennis Morgan heard about it, the following week, he instructed Union Steward Pamela Kennedy to tell employees "you guys need to get to work and cover this." Kennedy, with ABC's permission, sent a mass email to employees on the Company's email system asking employees to reconsider, telling them that Morgan "told us to get to work, so to speak." Employees began accepting overtime assignments that weekend (the weekend of October 18).

Jones met with the auditors to discuss the extent of the backlog on Monday or Tuesday, October 20 or 21. Although employees were, at this point, again willing to work overtime, Jones testified that he thought that "even if everybody signed up for overtime every day, I didn't think we could meet the goal of thirty (30) days" that he had agreed to with Anthem to reduce the backlog. By the time Jones met with the auditors, ABC had already decided that to catch up with the Anthem medical claims work, it would temporarily hire some employees to work offsite to perform work that otherwise would be performed by the bargaining unit employees. Indeed, with respect to medical claims, that process had already begun when Jones met with the auditors to explain the backlog problem. With regard to dental claims, that process had already begun, and finished.

On October 21, ABC hired two employees—one in Illinois and one in Maryland—to process medical claims using the Basys computer software system. Jones found the two from contacts he had at Basys, the software vendor that ABC had used when it began using the Basys system for certain automated claims earlier in the year. Jones asked Basys if they knew of anyone "familiar with the nuances of dealing with Anthem" and using the Basys system. On or about October 14, Basys gave him some people he could contact. Jones was eager to find individuals who would not require training so that ABC could make quick headway on the backlog. The two employees worked for approximately 30 days (one performed significantly more work than the other within this period). They processed

[3] Hereinafter, all dates are in 2008 unless otherwise indicated.

[4] The parties agree that under the terms of the 2006 Agreement overtime is voluntary. (See Article 37, Section 4.)

[5] Much about the layoffs and the refusal to work overtime is contested by the parties. The Respondent and the Union do not agree on which employees were laid off, and, additionally, whether some of the laid-off employees were still eligible for reinstatement. They do not agree on whether former and/or laid-off employees would have had the skills to quickly learn to perform the available work, some of which was now done using a computer software system—Basys—that ABC had purchased and implemented in early 2008 for some funds. A couple of employees testified to their unsuccessful efforts to return to work. While the issue of who was entitled to employment may well need to be sorted out in the compliance stage of this case, it is not a matter that affects, or is particularly relevant to, the case alleged by the General Counsel here. Accordingly, I do not reach or determine issues of which employees were on layoff or whether any employees on layoff had severed their employment with ABC. Of relevance, as discussed below, is that the dispute roiled employee-employer relations.

electronic medical claims from their computers, and ABC technicians made it possible for them to securely access the ABC files. Jones testified that these employees helped the Company to significantly reduce the backlog in accord with the goals set with Anthem. ABC employees were also working overtime during this period. As discussed, the weekend of October 18, employees began working overtime assignments again.

Jones testified that he was "pretty sure" he mentioned the hiring of temporary employees working offsite to Morgan in a telephone call, also involving Bostic, "[s]omewhere around the 20th or 21st [of October]." Morgan, who was traveling that week, denied having received such a call, and asserted that his first conversation with ABC management about the transfer of the work was with Bostic after October 27.[6]

Five employees were hired to process dental claims. They were employees of another claims processing company, Benefits Assistance Corporation (BAC) in Huntington. The owner of BAC, Bill Howard, was a longtime friend of Eastwood, the owner of ABC, and Jones had known Howard for many years. In fact, the two had been in discussions regarding the potential sale of the dental portion of ABC's claims processing business to BAC. The sale did not occur, but Jones used the occasion to ask if BAC employees could be approached about performing some work for ABC after hours. Ultimately, five BAC employees, using the BAC office and equipment, worked for approximately a day and a half (on Saturday, October 18, and Sunday, October 19) performing dental claims processing work for ABC.

On Friday, October 17, an ABC supervisor, Angie Napier, brought the paper dental claims from the ABC office to the BAC employees. All of these claims were paper or "hard" claims.

The BAC dental employees worked only for a day and a half. According to Jones, "[i]t proved to not be worth the trouble. . . . We weren't getting the kind of production that we needed to get to meet the goals." In addition, while the dental claims were backlogged, this backlog was not as serious as the medical backlog. There was no outside entity, "holding our feet to fire like we did . . . with Anthem." So ABC stopped utilizing the temporary help with the dental claims and over the course of the next few months reduced the dental backlog using ABC employees putting in overtime.

The Union was not notified in advance that ABC was going to remove work and bring it to BAC to have the dental claims work performed. ABC employees who came to work on Saturday, October 18, to perform overtime work discovered that the dental claims were missing and asked their supervisor where the claims were. The testimony is vague, but suggests that the supervisor avoided directly answering. On Monday, an ABC employee discovered that the claims had been handled by someone with initials unknown to them. On Tuesday, October 21, they again pressed their supervisor for an explanation. Bostic came to talk to the dental claims employees. She told them the work had been performed out of the office so that ABC could get caught up. The employees were upset and the discussion went back and forth, with the employees contending that they should have been permitted to do this work. Bostic was unable to answer some of the questions posed by employees, and at the conclusion of the meeting Bostic told employee Colburn that if she had any more questions she could write them down and Bostic would get back to her.

B. Requests for Information and the Union's Grievance

On Tuesday, October 21, Morgan received calls from Colburn and Lusk. They told Morgan that employees had discovered claims were missing and that they believed they were not getting "straight answer[s]" from the supervisors. Morgan instructed Colburn and Lusk to work together to put a request for a variety of information to Bostic. Colburn wrote the following questions and submitted them to Bostic that day, or possibly on the next day, October 22:

> (1) How much are these people getting paid: By the hour, by the claim. First 50–100 claim.
> (2) After claims are caught up, are all the clerks laid off again? If so wouldn't we be back in the same position we are now in.
> (3) As the Company quoted, what if these temps work long enough then wouldn't they be able to join the union – then what happens to the employees' (clerks) chance to bid on an auditor's position. It is my understanding you started from the bottom up. It is my understanding you started from the bottom up. Not just jump right in + become auditor.
> (4) How long did it take to find these people + where did you find them. Ad in the paper; or the internet, or is it family? Or Company
> (5) By the time upper management is having all these meetings some one could be down + training a new person to be an auditor.
> (6) [Suggestion:] Start them out slow with vision claims only with the group a fund that actually works correctly, then to routine dental + working their way up.
> (7) What about HIPAA – privacy – SS# taken away from office?
> (8) Problems and adjustments back to them?
> (9) Barb will be back 1st of December
> Will she have a job?

[6] Both Morgan and Jones were good witnesses, and generally credible. Jones stated that he was "pretty sure" he and Bostic conveyed this information to Morgan. Pressed, he would not endorse a more definitive recollection. This speaks well to his credibility, but does not inspire confidence that the conversation occurred, especially in the face of Morgan's credible denial. Moreover, I note that Bostic, also allegedly on the call, did not testify, and no notes of the call were produced. (Although Jones testified that Bostic "very well may have" taken notes, "she usually takes notes on those types of meetings.") Given these factors, were I required to, I would credit Morgan's denial over Jones' testimony that he was "pretty sure" the conversation occurred. However, I do not believe that it makes any difference to the outcome of this case whether or not Morgan was told about the transfer of work on October 20, 21, or later. Accordingly, I will assume, without deciding, that Jones and Bostic told Morgan in a phone conversation on one of those dates that "there were outside people doing the work, that weren't coming into Huntington."

Bostic provided Colburn the following handwritten response in approximately three days:

> (1) Paid contract rate per hour
> (2) We will have to give it time (after caught up_ to see what we need. We will not make nasty move.
> (3) We do not plan to keep them past 30 days. They are working as temp. employees.
> (4) Took approx. a week or so. We couldn't find anyone locally who knew systems. Basys found retired people for us. No family or company people.
> (5) We will determine our staffing needs after we get caught up, then provide training as necessary.
> (6) Appreciate the suggestion
> (7) All HIPPA regs. Are complied to.
> (8) Any questions will come in during reg. hours here. We will respond the best we can. Any issues you cannot handle give to Linda, Christa or Angie.
> (9) Of course Barb still has a job. She is a regular employee still on payroll with all Benefits.

Colburn provided Bostic's response to Union Steward Lusk, who faxed it to Morgan on October 27. After reviewing the fax, Morgan determined that, in his view, ABC was violating the collective-bargaining agreement. He spoke with Bostic, who took the position that ABC was within its rights, based on the "Temporary Employees" provision (Article 31) of the labor agreement.[7] Morgan dissented, and told Bostic that in the past temporary employees had only been used in the Huntington facility. Morgan told Bostic that ABC "had never taken work out of that facility and sent [it] to a temporary employee."

Morgan contended that a Memorandum of Agreement (MOA) negotiated with the labor agreement and attached to it supported his position. That MOA prohibited subcontracting and the transfer of bargaining unit work, with exceptions described in the MOA. Morgan also expressed concern to Bostic that the employer had never used temporary employees at all when bargaining unit employees were on layoff, as, Morgan contended, was the case here.

Morgan was unable to convince Bostic. According to Morgan, "[s]he was hung up on this temporary thing. So we filed a grievance [under the labor agreement] to protest the Employer's actions." The Union's grievance, dated November 11, alleged that

> ABC has unilaterally diverted/subcontracted bargaining unit work in violation of the parties' agreement, MO[A], and well established labor law. On behalf of all affected employees, the Union hereby requests that all such work be returned to the bargaining unit, that ABC cease its violations of the agreement and that all affected employees be made whole in every way.

ABC refused to process this grievance, alleging that it was untimely.

On November 19, Morgan sent Bostic an 11-numbered paragraph request for information "necessary and relevant to the processing of current grievances and for it to carry out its function as collective bargaining representative of the employees." The request covered the period January 1, 2008 to the present. The eleven requests were:

> 1. Please provide any and all documents that show the date the company contacted any individuals the company contends are temporary employees to do work that is or has been performed by bargaining unit employees.
> 2. Please provide the names, addresses and phone numbers for any and all individuals the company contends are temporary employees doing work that is or has been performed by bargaining unit employees.
> 3. Please provide the total compensation paid to each temporary employee, including all salary and benefits. This information should include all hours worked) including any hours considered or paid as overtime. This request also includes any payroll records, W-2 forms or other documents that show earnings by temporary employees.
> 4. Please provide copies of any and all applications, resumes, curriculum vitas or other information submitted by individuals that the company either considered for hire or did in fact hire as temporary employees. This information should include any and all documents and/or information that show which individuals the company interviewed and any results of those interviews and the basis for which the decision to hire was made.
> 5. Please provide any and all documents and information that show how the company initially contacted any and all temporary employees that were hired by the company.
> 6. Please provide the closest office location of the company for each temporary employee hired by the company.
> 7. Please provide any and all information that shows how work was sent out either in an electronic form or otherwise to these temporary employees.
> 8. Please provide any and all information that shows what work was sent out either in an electronic form or otherwise to these temporary employees. Please include all dates in which the work was sent to these temporary employees and the person or persons who authorized the transfer of that work.
> 9. Please provide any and all information that shows how the work was returned to the company by these temporary employees in a completed or incomplete form, the dates that the work was returned and the person or persons to whom the work was returned.
> 10. Please provide any and all information that shows which claims that came into the office in written form that were removed from the desks of employees on or about October 11, 2008 and sent out to temporary employees. Please provide the names of the person or persons who authorized the removal and transfer of this work and any and all documents that state the reason for the removal and transfer of the work.
> 11. With respect to request #10 above, please provide any and all information that shows to whom the work was sent, including their names, addresses, phone numbers and their rate of pay and benefits for the work performed.

[7] The text of this, and other contractual provisions relevant to this dispute, are set forth below in subsection C of this portion of this Decision.

Morgan's letter requested that the information be provided within five calendar days. Bostic responded, by letter dated November 25, stating, in relevant part:

> I write in repo[n]se to you[r] letter of November 19, 2008 requesting certain information that you contend is necessary for the Union to carry out its functions as the collective bargaining representative of the employees of American Benefit Corporation. It is American Benefit Corporation's position that many of the requests contained in your letter are overly broad and seek irrelevant information. However, American Benefits Corporation is in the processing of assessing these requests and will respond to your requests in writing by December 5, 2008.
>
> I acknowledge that this date is not within the five (5) calendar days as requested in your letter, however, this time frame is necessary in order to assess your requests and gather the necessary information, if any.

By letter dated December 5 (but received by Morgan via fax on December 8), Bostic wrote to Morgan, stating, in relevant part:

> I am following up on your information request dated November 19, 2008. As you recall, I wrote to you stating the company required more time to assess your request and that we would respond by today, December 5, 2008. We feel the request is overly broad and seeks information that is not relevant to the Union's role as the collective bargaining representative for American Benefit Corporation's employees. However, I am providing you with the attached information which appears to the Company to be relevant to the Union's stated issue of subcontracting/diverting bargaining unit work
>
> The attached chart shows the dates temporary employees were used, the number of employees used, type of work performed, number of hours worked, arid rate of pay for these employees. None of these employees received any benefits of any kind.
>
> The two employees paying medical claims received work electronically. The five employees paying dental claims received paper claims which were delivered to them. Management determined that since these five employees would be working odd hours that it would be safer for them to work closer to their homes. It was also determined that the work could be performed at a location other than American Benefit's office location, therefore saving them time and gas.
>
> The dental claims were removed on the evening of Friday, October 17, 2008, and returned to the office on Monday morning, October 20, 2008.
>
> Please let me know if you have any questions.

The attachment to Bostic's letter showed the following:

	Hours	Amount
Dental (5 employees)		
10/18/2008		
Emp 1	5.00	
Emp 2	3.00	
Emp 3	-	
Emp 4	9.00	
Emp 5	8.50	
	25.50	
10/19/2008		
Emp 1	5.00	
Emp 2	12.75	
Emp 3	7.00	
Emp 4	5.00	
Emp 5	10.00	
	39.75	
Grand total Dental	65.25	hours
Rate	23.5	per hour
Medical (Anthem—2 employees)		
Employee 6		
10-21 to 10/31	51.5	
11/1 to 11/14	50	
11/17 to 11/21	24	
Total Emp 6	125.5	hours
Emp 7		
11/1 to 11/14	15	
11/17 to 11/21	8	
Total Emp 7	23	hours
Total for Anthem	148.5	
Rate	23.5	per hour
Gross Wages (Anthem)	$	3,489.75
Grand Total	213.75	hours
Grand Total	$	5,023.13

After Morgan received Bostic's letter and the attachment, he responded to Bostic with a letter, dated December 9, stating the following in relevant part:

> I am in receipt of the company's December 5, 2008 incomplete and inadequate response to the Union's November 19, 2008 information request. In your response, you contend that the request "is overly broad and seeks information that is not relevant to the Union's role as collective bargaining representative" of the company's employees but you fail to identify which requests the company is objecting to. Please specifically identify which requests for information the company deems to be overly broad and/or irrelevant and the basis for those objections. Please provide a response to this letter by December 16, 2008.
>
> Please contact me if you have any questions.

The record reveals no further correspondence from the Respondent, or from the Union, concerning the information request. However, on April 24, 2009, four days before the hearing in this matter, counsel for the Respondent provided the Union's counsel, and counsel for the General Counsel, with 44 additional pages of documents responsive to the information request. These documents (entered into the record as Union

Exhibit 1) consist of copies of pay records, W-2 forms, time sheets, some emails, and other such documents relating to the work of the temporary employees (both the five employees who processed dental claims and the two employees processing Anthem medical claims).

C. Relevant Contractual Provisions

As referenced above, the 2006 Agreement was effective June 9, 2006, and continues in effect by its terms until no earlier than midnight June 8, 2011. The 2006 Agreement was executed July 20, 2006, and signed by all members of the Union and ABC bargaining committees. Attached to the 2006 Agreement, included in its table of contents, and entered into evidence without objection as part of "the current collective-bargaining agreement between American Benefit and Teamsters Local 505," were several memoranda and exhibits. These included two "Memorand[a] of Understanding" and, of most significance to the instant cases, a Memorandum of Agreement (previously denominated as the MOA). Each of these memoranda, like the 2006 Agreement, was executed July 20, 2006, by the same Union and ABC bargaining committees. In addition, wage rate schedule exhibits, developed in August 2006, were attached to the Agreement. Finally, a 2008 Memorandum of Agreement To The Collective Bargaining Agreement was included in the document introduced into evidence as a part of the current collective-bargaining agreement.[8]

The 2006 Agreement, of course, reflects the parties' agreements reached at negotiations in 2006. I recite from the provisions—that the parties, at least, believe to be—of most relevance here.

The "Recognition" clause of the Agreement (Article 2) provides that ABC recognizes the Union as the exclusive collective bargaining representative of "all employees employed by the Employer at its Huntington, West Virginia location" (with the typical exclusions for managers, professionals, guards, and supervisors).

> A "zipper" clause (Article 1, Section 2) provides that:
> [i]nasmuch as both parties have had a full opportunity to negotiate with respect to all matters relating to wages, hours and all other terms and conditions of employment, neither party is under any duty to bargain with respect to any changes, modifications or additions to this agreement to take effect during its term [except with regard to the establishment of new classifications, a matter irrelevant to the instant dispute].
>
> A management rights clause (Article 8) provides that:
> the right to direct the work force and to determine and direct the policies, mode and methods of operating the business is vested exclusively in the Company, except as expressly limited by provisions of this agreement. Among these rights are the right to hire, suspend, discharge, promote, transfer, assign jobs, increase forces and decrease forces, create new jobs or change existing jobs, provided that this Article will not be used in violation of any of the other provisions of this agreement.
>
> Article 31 of the Agreement is titled "Temporary Employees," and states:
> The Union recognizes the need for the Company to use outside temporary employees in cases where the workload is of an immediate nature such that it cannot be completed by regular employees during the normal work day or during overtime hours.

The MOA is more difficult to selectively characterize or succinctly quote, but generally, may be said to concern the issue of the transfer of work performed by the bargaining unit employees to offsite nonbargaining unit personnel. It consists, in the first instance, of an update to an agreement reached between the parties in 2004 regarding the performance of bargaining unit work by Maria Beimly.

Uncontroverted testimony at the hearing established that in 2004 the parties negotiated an agreement permitting Ms. Beimly—a nonbargaining unit employee—to perform work in Vandalia, Ohio, related to a particular client's pension fund. ABC's then owner, Ken Joos, explained to the Union that Beimly was a longtime employee of an I.B.E.W. fund, who performed work at the fund's office in Vandalia, Ohio. Essentially, as a condition of ABC taking over the third-party administrator business for the fund, the fund insisted that Ms. Beimly be permitted to remain employed performing a portion of the work that would otherwise be done by the ABC bargaining unit employees in Huntington. ABC rented space in Vandalia, Ohio, and Beimly continued to work there. As Morgan understood it, "[e]vidently Ms. Beimly was fairly old and they didn't want to kick her to the curb, if you will. . . . [T]hey wanted to make sure that Ms. Beimly had enough work. Ken Joos . . . told me it was critical to keep that business. It was critical that Ms. Beimly be allowed to keep [working]."

The Union agreed to this arrangement in 2004, with the condition that upon Beimly's retirement the work would be returned to the bargaining unit in Huntington, and with the further condition that "[t]he company agrees that there will be no further subcontracting of bargaining unit work currently performed at the American Benefit office in Huntington, WV." In 2004, the Union believed, based on discussions with Joos that the arrangement would not be longstanding, and Beimly would retire by 2006, the end of the labor agreement then in effect.

Contrary to the Union's (and presumably ABC's) anticipation, when the time came to negotiate the 2006 Agreement, Beimly continued to work and did not want to retire. In the 2006 negotiations, ABC pressed the same argument—to ac-

[8] There is some suggestion by ABC that the MOA was not part of the 2006 Agreement. It makes no difference to the outcome or analysis of this matter whether, formally speaking, the Memorandum has been incorporated into the 2006 Agreement. There is no doubt, that both documents are collectively-bargained documents, entered into by the parties to address and govern workplace issues. They both matter to someone attempting to interpret the parties' contractual obligations and responsibilities. I do note, however that the MOA was entered into evidence, without objection, as part "the current collective-bargaining agreement," which essentially constitutes an admission that the Memorandum is part of the 2006 Agreement. Moreover, and equally compelling, as referenced, supra, the MOA, along with the other attachments to the 2006 Agreement, is listed in the contract's Table of Contents. Moreover, both documents were negotiated as part of the same contract negotiations and entered into by the same parties, at the same time, represented by the same individuals. Thus, I find that the Memorandum is part of the 2006 Agreement.

commodate the client—for permitting Beimly to continuing working. Again the Union agreed, but with express conditions, set forth in the MOA, restricting Beimly from performing additional bargaining unit work, and requiring the return of the work to the bargaining unit upon Beimly's severance. The MOA also resolved similar situations, in similar manner, with regard to two Information Technology employees performing work "outside the terms of the collective-bargaining agreement." Finally, the MOA provides:

> Further, the Employer agrees that this memorandum will not be interpreted as a waiver by the Union with regards to the subcontracting of bargaining unit work in any fashion and that the Employer also agrees that there will be no subcontracting or transfer of bargaining unit work in the future absent a signed agreement by the parties to that effect.

LEGAL ANALYSIS

A. Unilateral Change Allegation

The complaint alleges that the Respondent's temporary diversion of bargaining unit work to offsite temporary employees, in October and November 2007, was undertaken without providing the Union with notice and an opportunity to bargain. The Government contends that the unilateral transfer of this work violates section 8(a)(5) and derivatively, Section 8(a)(1) of the Act.

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 606 (2006). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc*., 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

As discussed below, I conclude that the transfer of work at issue was a unilateral change in a mandatory subject of bargaining, and that ABC did not provide the Union with meaningful notice and an opportunity to bargain before it undertook the transfer of the work. In fact, the Respondent does not dispute these elements of the General Counsel's burden. Rather, the Respondent's defense is that the Union waived the right to bargain over this change in the collective-bargaining agreement.

1. The transfer of work was a unilateral change in a mandatory subject of bargaining

"Subcontracting of bargaining unit work that does not constitute a change in the scope, nature, or direction of the enterprise but only substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining." *Spurlino Materials, Inc*., 353 NLRB No. 125, slip op. at 21 (2009). See, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace"); *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001) (the "reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work"), enfd. 317 F.3d 300 (D.C. Cir. 2003); *St. George Warehouse, Inc*., 341 NLRB 904 (2004) ("Respondent's unilateral transfer of unit work to temporary agency employees violated Section 8(a)(5) and (1)"), enfd. 420 F.3d 294 (3d Cir. 2005).

In this case, the transfer of the dental and medical claims processing work was core bargaining unit work, of exactly the type performed by the bargaining unit, using the same technologies and processes. The conclusion is inescapable, and undisputed, that the transfer of work involved a mandatory subject of bargaining.

I would add that, putting aside, for the moment, the Respondent's assertion that Article 31 of the 2006 Agreement privileged its actions, Morgan's credited—and undisputed assertion—was that ABC had never before diverted bargaining unit work to temporary employees outside of the facility. This establishes that in transferring this work ABC was not following an established practice that did not alter the status quo. See *Post Tribune Co*., 337 NLRB 1279 (2002) (no unlawful unilateral change where employer's action does not alter the status quo, and thus there is no change in existing conditions).[9]

Similarly, the fact that the Respondent asserts—for the first time, as far as the record reveals—the right to transfer work offsite, when otherwise in accord with the conditions of Article 31, establishes that ABC's action represents a change in existing conditions of employment, and not simply a one time application (or breach) of contract. Again, putting aside, for the moment, the Respondent's claim that the contract sanctions its action, the transfer of work at issue constitutes the first overt declaration of this position and policy. Whether or not otherwise permitted by law or contract, it is a unilateral change in hitherto existing conditions.

[9] Moreover, although technically, it did not involve a temporary employee under Article 31, the Beimly situation is akin to the exception that proves the rule. Thus, when ABC previously sought to transfer bargaining unit work to an offsite employee—Ms. Beimly—the parties collectively bargained a resolution. This precedent illustrates, and adds weight to, the conclusion that the issue is grist for the collective bargaining mill.

2. The failure to give notice to the Union

In this case, the evidence demonstrates that—at the earliest—the Union was told of the diversion of work after the dental work had been contracted out (and returned), and the day after, or perhaps the day of the transfer of medical claims to the temporary employees. The Respondent does not contend that this provided adequate notice to provide the Union an opportunity to bargain.[10] To the contrary, the Respondent contends that it had no duty—based on a contractual waiver—to provide the Union with notice and an opportunity to bargain over the transfer of work.

Still, while maintaining it had no duty to bargain, the Respondent claims (R. Br. at 7, 12) that its employees' unwillingness to work overtime gave it "no other option" and "forced" it to use the temporary employees to solve its backlog problem. The suggestion that circumstances precluded bargaining—had ABC been willing to bargain—warrants comment.

Although the Respondent needed to respond to the growing backlog and—particularly once Anthem called to complain—had to quickly develop a plan to lower the backlog of medical claims, nothing about the situation would support a claim that bargaining a solution was impractical. The backlog did not come out of nowhere, it built over the summer and was recognized as a problem by August and September. In October, the Respondent met with employees to urge them to accept overtime because of the imperative to correct the backlog, but did not mention the possibility of hiring temporary employees.

This is time that could have been spent bargaining with the Union. While the length of time the Respondent would have been required to bargain before reaching impasse, and the speed with which the Union would be obligated to respond to the Respondent's notice, would have been affected by the Respondent's need to satisfy Anthem, there is no basis on this record to believe that bargaining would have been futile or impractical.

Indeed, what the evidence shows is that Morgan moved immediately (and successfully) to encourage employees to volunteer for overtime as soon as he learned that they had failed to accept offers of overtime. What the evidence shows is that the debate the Respondent had with its employees—about overtime, and about whether employees on layoff should be recalled in lieu of overtime opportunities, is a debate the Union and ABC could have had in the context of bargaining. Similarly, the issue of whether laid off employees were qualified to perform the work the Respondent contracted out did not have to be brought to the Board for resolution: it could have been the subject of bargaining between the Union and ABC—had ABC notified the Union of its intent to transfer the work to nonunit employees.

As it was, ABC had this debate with its employees at the October 9 meeting, but without notifying the employees—much less the Union—of its intent to temporarily contract out unit work. The raucousness, the disciplinary action against Lusk, and failure of management to convince employees to volunteer for overtime—provide a textbook example of how unilateral action and disregard of bargaining can contribute to labor strife. Had ABC notified the Union of its intent to contract out, the ensuing discussion regarding the employees' willingness to work overtime and their anger over ABC's failure to recall former/laid off employees, might have looked very different. This case spotlights the very point of the Act: collective bargaining as a promoter of peaceful settlement of disputes. As the Supreme Court explained in *Fibreboard*, 379 U.S. at 211, 214, in reasoning directly applicable here:

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42–43 [1937]. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace. . . .
>
> . . . [A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

(footnote omitted).[11]

3. The Respondent's waiver defense

The Respondent's defense is rooted in the contention that in the collective-bargaining agreement the Union waived the right

[10] It clearly did not. "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the Union of a fait accompli." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (footnotes omitted), enfd. 722 F.2d 1120 (3d. Cir. 1983). "[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel*, 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals*, 342 NLRB 787, 787 fn. 4 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

[11] I note that the Respondent does not advance an argument that "compelling economic considerations" excused it from a duty to bargain. See *RBE Electronics*, 320 NLRB 80, 81 (1995). Rather, it contends that it had no duty to bargain because of a contractual waiver. Consistent with the discussion in the text, I would reject the claim (had it been made) that "compelling economic circumstances" excused the duty to bargain. Neither the backlog nor the decision to hire temporary employees was an 'extraordinary' . . . "unforeseen occurrence." *RBE Electronics*, supra at 81, quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). "Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics,* supra at 81 (footnotes omitted).

to bargain over the (temporary) transfer of bargaining unit work to outside employees. ABC contends that the parties' collective-bargaining agreement—specifically, Article 31, which provides conditions for the use of temporary workers—justifies its actions, and establishes the Union's waiver of the right to bargain. To this, the Respondent adds arguments relying on the management rights and zipper clauses found in the 2006 Agreement. The General Counsel and the Union dispute this, contending that neither Article 31, nor other provisions of the 2006 Agreement, establishes a waiver. Indeed, the General Counsel and the Union point to the MOA, and its prohibition on subcontracting, to bolster their claim that Article 31 does not provide contractual sanction for ABC's transfer of work to offsite temporary employees.

The outcome in this case is not determined by who is "right" in their reading of the contract, but by the Board's "clear and unmistakable waiver" rule. The Board applies the "the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of the collective-bargaining agreement." *Provena St. Joseph Medical Center,* 350 NLRB 808, 810 (2007). Accord, *Baptist Hospital of East Tennessee, 351 NLRB 71, 71–72 (2007) (applying clear and unmistakable* waiver standard to find unilateral change lawful based on contractual provision); *Verizon North, Inc.,* 352 NLRB 1022 (2008) (applying "clear and unmistakable waiver" standard to employer's claim that contract language regarding Family and Medical Leave Act was defense to 8(a)(5) unilateral change allegation); *Cardi Corp*., 353 NLRB No. 97, slip op. at 1 fn. 5 (2009) ("Applying the 'clear and unmistakable waiver' standard reaffirmed in Provena St. Joseph Medical Center, [supra], we agree with the judge that the Union did not waive its right to bargain over the Respondent's driver's license requirement," notwithstanding employer's contention that deletion in current collective-bargaining agreement of clause that employees were not required to own automobile demonstrated that parties had now contractually agreed that licenses could be required).[12]

Under this rule, waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *Allied Signal Aerospace,* 330 NLRB 1216, 1228 (2000), review denied 253 F.3d 125 (2001); *General Electric*, 296 NLRB 844, 857 (1989), enfd. w/o op. 915 F.2d 738 (D.C. Cir. 1990).

In a unilateral change case a collectively-bargained provision may be deemed to constitute a waiver by the union of the employer's duty to bargain over the conduct, but only if the contract's text, or the parties' practices and bargaining history "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, supra at 811.[13]

Application of this rule to the facts here leaves ABC with little in the way of defense. The Respondent contends (R. Br. at 11) that the "Temporary Employees" clause of the labor agreement (Article 31) establishes a clear and unmistakable waiver of the duty to bargain over the contracting out of bargaining unit work to offsite temporary employees. However, Article 31 does not expressly treat with the issue of whether the temporary employees envisioned by the clause can work at noncompany locations on bargaining unit work sent out of the facility. It is true that Article 31 does not proscribe the employer from send-

[12] Respondent does not dispute that this is the correct rule to apply. (See R. Br. at 10–14.)

[13] The Board applies a different rule—one more deferential to the employer's view of its rights under the contract—in 8(a)(5) cases alleging a failure to abide by a collective-bargaining agreement in violation of section 8(d) of the Act. Cases alleging a violation of 8(d) of the Act are focused on allegations that the employer has modified and failed to abide by the terms of the collective-bargaining agreement. In 8(d) cases, "[w]here an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or . . . acting in bad faith,' the Board ordinarily will not find a violation. In such cases, there is, at most, a contract breach, rather than a contract modification." *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005) (footnotes, internal quotations and citations, omitted), enfd. 475 F.3d 14 (1st Cir. 2007). While the delineation between the two standards may have, in years past, been less than clear, at least since the Board's decision in *Bath Iron Works*, supra, it is pellucid that the "sound arguable basis" standard does not apply, where, as here, the General Counsel alleges a unilateral change violation of Sec. 8(a)(5), and not an 8(d) violation of Sec. 8(a)(5). *Bath Iron Works*, supra at 501 ("In 'unilateral change' cases, where all that is alleged is that a union had a statutory right to bargain before an employer's proposed change, the Board has considered whether the union has clearly and unmistakably waived its right to bargain over the change," but that "is not the correct standard for an allegation of an 8(d) contract modification"); *Verizon North*, supra at 1022 fn. 2 (unilateral change violation based on finding that union did not clearly and unmistakably relinquish its right to bargain over disputed practice and noting that "[i]n making that finding, we do not rely on the judge's citation of *Bath Iron Works Corp.*, [supra]. That case involved a different theory of violation and a different legal standard."); *Baptist Hospital of East Tennessee*, 351 NLRB at 72 fn. 5 (2007) (applying clear and unmistakable waiver standard to find unilateral change lawful, and finding that while "[a]t various times during the litigation of this case, the General Counsel appeared to make the argument that the Respondent's actions 'modified' the contract, in violation of Sec. 8(a)(5) –Sec. 8(d) . . . the General Counsel [is] master of the complaint" and "did not clearly pursue an 8(d) contract modification theory in this case").

Given the profoundly different—often result-altering—rules applied to 8(d) and unilateral change cases by the Board, it is worth noting that the instant case—which was pled and litigated as a unilateral change case, could have—based on the Union's contention that the labor agreement affirmatively *prohibits* ABC's temporary diversion of work—been pled as an 8(d) violation. It was not, and it is well-settled that the General Counsel is the master of the complaint. The ramifications of the decision to prove a unilateral change case, and not a contract modification, include a more favorable standard for the General Counsel, but also limitations in terms of remedy. "The remedy for a[n 8(d)] contract modification is the more substantial one of ordering adherence to the contract for its terms; the remedy for a unilateral change permits the restoration of the change after bargaining to an impasse." *Bath Iron Works*, supra.

ing work out, but it does not expressly permit it either, and, therefore, a "clear and unmistakable" waiver cannot be gleaned from Article 31. And even, assuming, wrongly, that Article 31 could be read as expressly permitting the transfer of work offsite, other collectively-bargained provisions muddy—dispositively, given our inquiry—the Respondent's claim.

Specifically, the MOA negates any contention that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action" with regard to diversion of bargaining unit work to nonunit employees offsite. Provena supra. The entirety of the MOA is devoted to listing permitted instances of bargaining union work being performed offsite by nonunit individuals. These instances stand as collectively-bargained exceptions to the further collectively-bargained provision in the MOA that,

> the Employer agrees that this memorandum will not be interpreted as a waiver by the Union with regards to the subcontracting of bargaining unit work in any fashion and that the Employer also agrees that there will be no subcontracting or transfer of bargaining unit work in the future absent a signed agreement by the parties to that effect.

Moreover, the MOA states that "the Employer agrees that this memorandum will not be interpreted as a waiver by the Union with regards to the subcontracting of bargaining unit work in any fashion." This, of course, is the opposite of a waiver of the Union's bargaining rights—and vitiates any claim of a "clear and unmistakable" waiver.

Under the circumstances presented, application of the "clear and unmistakable" standard thwarts every contention advanced by the Respondent. ABC suggests (R. Br. at 11) that it is a "gross generalization" to call its temporary hiring of offsite employees "subcontracting in any fashion" or "subcontracting or transfer of bargaining unit work," unilateral actions prohibited by the MOA. But this is far from clear, and one could, indeed, mistake the diversion of work to outside employees—even temporarily—as a manner of subcontracting, not to mention a transfer of bargaining unit work. It is reasonable to read the language of the MOA as prohibiting ABC's actions here. Accordingly, the argument that Article 31 is consistent with ABC's action, and may permit it, cannot add up to evidence showing a clear and unmistakable waiver.[14]

The Respondent argues that Article 31 is not subordinate to the MOA. That is true, but neither is Article 31 superior to the MOA. Both were collectively-bargained, in the same negotiations, and effective at the same time. There is no basis in law, logic, or contract interpretation to ignore or devalue the MOA when attempting to assess whether the Union has "clearly and unmistakably" waived its right to bargain over the transfer of bargaining unit work. In the face of the MOA's express prohibition on the practice, and its conditioning of future subcontracting on an agreement between the parties on the subject, it is not credible to conclude that the 2006 Agreement,

considered as a whole, "clearly and unmistakably" show that the parties intended to waive the Union's bargaining rights on this subject.[15]

ABC also asserts that the management rights and zipper clauses in the 2006 Agreement indicate a waiver of the Union's right to bargain over the transfer of work. However, a generally worded management rights clause, such as this one here, will not be construed as a waiver of statutory bargaining rights when it does not specifically make reference to a particular mandatory subject, and where there is also no evidence that the parties discussed permitting the specific unilateral action under the management rights clause. *Hi-Tech Cable Corp*., 309 NLRB 3, 4 (1992), enfd. w/o op. 25 F3d 1044 (5th Cir. 1994). *Johnson-Bateman Co*., 295 NLRB 180, 185 (1989) (Board has consistently found that general management-rights clause does not constitute a clear, unequivocal, and unmistakable waiver by union of its right to bargain about implementation of a work rule not specifically mentioned in the clause).

Nor can the zipper clause (Article 1, Section 2) contained in the 2006 Agreement justify the Respondent's unilateral change in the status quo. Zipper clauses that are broadly and conclusively worded can serve to "shield," from a refusal to bargain charge, a party on whom a mid-term bargaining demand is made. However, the Board holds that broadly worded zipper clauses cannot be used as a "sword" to justify a unilateral change without bargaining. *ANG Newspapers*, 350 NLRB 1175 fn. 3 (2007): *Success Village Apartments, Inc*., 348 NLRB 579, 629 (2006); see, *Michigan Bell Telephone,Co*., 306 NLRB 281, 282 (1992). This is precisely what the Respondent here proposes: that the contract's zipper clause justifies making unilateral changes in mandatory subjects without having to bargain. However, there is nothing specific to the zipper clause regarding the diversion of work, the hiring of temporary em-

[14] Because my task is not to rule, as an arbitrator would, on the parties' contractual dispute, it is not necessary to determine whether the diversion of unit work to temporary employees undertaken by the Respondent constitutes "subcontracting" or the "use [of] outside temporary employees" as envisioned by the labor agreement and the MOA. What I am determining is that based on the labor agreement, including the MOA, ABC's contractual right to engage in a temporary offsite diversion of work is not unambiguous or unequivocal, and that a "clear and unmistakable" waiver has not been proven.

[15] ABC claims that Article 1, Section 4 of the 2006 Agreement supports the view that the MOA is invalid in the face of conflicting provisions in the body of the 2006 Agreement. Article 1, Section 4 provides:

> The Employer agrees not to enter into any verbal or written agreement with the Union employees covered hereby, individually or collectively, which in any way conflicts with the terms or provisions of this agreement.

ABC argues that, based on this language, any conflict between Article 31 and the MOA is to be resolved in favor of Article 31. This is wrong three times over. It is wrong because Article 31 conflicts with the MOA only if Article 31 is read to permit temporary employees to perform unit work offsite, something it could mean, but, contrary to ABC's claim, does not have to. It is wrong because ABC's contention assumes that the MOA is not part of the 2006 Agreement, a contention, for reasons discussed, above, I reject. But, even assuming these two premises, ABC's contention is still wrong, because Article 1 Section 4 prohibits ABC from entering into agreements with union *employees* that conflict with the 2006 Agreement. The MOA is not between *ABC and Union employees*, but between *ABC and the Union*, the exclusive bargaining representative of the unit employees. Article 1, Section 4 does not suggest that collectively-bargained agreements between ABC and the Union are subordinate to the 2006 Agreement.

ployees, subcontracting, or any other label that one could reasonably attach to the subject in dispute. "[T]he Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers of statutory rights." *Windstream*, supra at 50. "Here, nothing in the language of Article I, Sec. [2, zipper clause] cited by the Respondent, or elsewhere in that provision for that matter, makes reference to, much less mentions, the right claimed by the Respondent to unilaterally institute [a diversion of unit work offsite]. The clause thus lacks the degree of specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over this subject matter." *Pan American Grain Co*., 343 NLRB 205, 217 (2004) (finding that broadly worded zipper clause did not waive union's right to bargain over midterm unilateral change implemented by employer).

To the foregoing contentions by ABC, no bargaining history, and no past practice of the use of temporary employees' offsite, is added in an effort to show a "clear and unmistakable" waiver by the Union of its bargaining rights. The Union's claim, undisputed by the Respondent, is that Article 31 has never in the past been interpreted or relied upon to sanction offsite use of temporary employees for bargaining unit work. In this regard, the only evidence of past examples of nonunit employees performing bargaining unit off site are those set forth in the MOA as exceptions carved from the general prohibition on diversion of unit work set forth in the MOA. Those are the exceptions that prove—or at the least support the view—that the parties' chosen rule is that there is not a contractual right for the employer to unilaterally divert work offsite. This is kind of evidence, of course, cuts directly against the claim that the Union "consciously yielded" this issue in bargaining or that the Union "clearly and unmistakably" waived the right to bargain through contract.

The Respondent has failed to demonstrate a clear and unmistakable waiver by the Union of its right to bargain about the diversion of work. The Respondent failed to provide the Union notice and an opportunity to bargain before unilaterally diverting bargaining unit work to temporary employees. Accordingly, the Respondent has violated Section 8(a)(5) of the Act and, derivatively, Section 8(a)(1).[16]

B. Failure to Supply Requested Information

The complaint alleges that the Respondent unlawfully failed and refused to furnish the Union with much of the eleven-numbered paragraphs of information requested in the Union's November 19, 2009 letter. Some of the requested information was provided in the letter faxed to Morgan on December 8. Nothing more was provided for over four months, when, on April 24, 2009, days before trial, the Respondent provided 44 pages of additional information. Other information was never provided. As I read the complaint, and the arguments advanced by the General Counsel and the Union, they do not contend that the limited information provided December 8 was untimely. The dispute is over the information not supplied until April 24, 2009, or not supplied at all.

The applicable principles "regarding the obligation of an employer to submit information is clear and not in dispute." *Monmouth Care Center*, 354 NLRB No. 2, slip op. at 41 (2009):

> An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967*); Dodger Theatricals*, 347 NLRB 953, 867 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *National Broadcasting Co*., 352 NLRB 90, 97 (2008); *Pulaski Construction Co*., 345 NLRB 931, 935 (2005).
>
> Where the requested information concerns terms and condition of employment of employees within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co*., 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Where the information sought concerns employees outside the bargaining unit, the union must show that information is relevant to its representative functions. *Dodger Theatricals*, supra at 14; *Bryant Stratton Business Institute*, 321 NLRB 1007, 1013 (1996). Although the union has the burden of showing the relevance of nonunit information, that burden is not exceptionally heavy, requiring only a showing of probability that the desired information is relevant, and that it would be use to the union in carrying out its duties and responsibilities. *Certco Distribution Center*, 346 NLRB 1214, 1215 (2006); Bryant Stratton, supra.

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993). "An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. " *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch 'as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000) (Board's brackets), quoting, *Pennco, Inc*., 212 NLRB 677, 678 (1974).

1. The relevance of the Union's information request

As to nonunit information for which relevance must be demonstrated, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances."

[16] The Respondent's violation of the Act is a derivative violation of Section 8(a)(1) of the Act, "the rationale therefore being that an employer's refusal to bargain with the representative of his employees necessarily discourages and otherwise impedes the employees in their effort to bargain through their representative." *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

Disneyland Park, 350 NLRB 1256, 1258 (2007) (footnote omitted).

Board precedent views information about the contracting out of work from the bargaining unit as a request for information that is not presumptively relevant. *Disneyland Park,* 350 NLRB at 1258. Thus, a showing of relevance by the Union is required. However, as noted, this means only a showing of a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Public Service Electric & Gas Co*., 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). A "discovery-type standard" governs information-request cases under Section 8(a)(5) of the Act (*NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)), even where the relevance of the information must be established, and is not presumed. *Disneyland,* supra at 1258; *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

And where, as here, the information is requested in connection with a grievance, the Board's test for relevance remains a liberal one. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in Moore's Federal Practice that "it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. … Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." 385 U.S. at 437, fn. 6, quoting 4 Moore, Federal Practice P26.16[1], 1175–1176 (2d ed.). Board precedent has continued to abide by this standard. As the Board explained in *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991):

> the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided . . . . Moreover, information of "probable relevance" is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because "a union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance." Further, because the Board, in passing on an information request, is not concerned with the merits of the grievance, it is also not "willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding." [Citations omitted].

Applying this standard, the Board has regularly found relevant information regarding nonunit employees performing the same tasks as bargaining unit employees. See, e.g., *United Graphics*, 281 NLRB 463 (1986) (it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit relates directly to the policing of contract terms); *Certco Distribution Center,* 346 NLRB 1214, 1215 (2006) (union sought information about the transfer of product to and the establishment, management, and staffing of employer's new nonunion facility. ALJ ordered production of only information related to transfer of products. Board reversed, holding that "the Union has shown that it had a legitimate concern about the possible transfer of unit work . . . and had filed a grievance related to those concerns. In these circumstances, we find that the Union has shown that the information requested about the nonunit [ ] operation was relevant").

In this case, the information requested by the Union concerned details—the who, what, where, when, and how—regarding ABC's hire and use of nonunit employees to perform bargaining unit work offsite. The request also sought information regarding the nature of the unit work performed. Under the circumstances, the relevance of the nonunit information should have been apparent to ABC. This was not a case where the Union needed to cite additional facts to justify its desire for this information. First, there was no dispute but that the diversion of work was the primary subject and motivation for the information request. And there was no dispute but that the subcontracting/diversion of work had occurred. The request for information was not motivated by rank suspicion or speculation about a transfer of work by ABC. It had, occurred, although there was much the Union did not know about it.

Second, at the time of the information request, there was no doubt, by either party, that the Union believed that ABC's actions violated the parties' collective-bargaining agreement. A grievance had been filed alleging just that. The information request referenced pending grievances and stated that the information request was in support of the grievances. From the beginning, the outlines of the contractual dispute were clear to both parties, both from the grievance and from discussions between Bostic and Morgan. ABC knew the Union believed that the MOA and other provisions, prohibited ABC's transfer/subcontracting of work to temporary employees working offsite. Similarly, the Union knew that ABC believed its actions were justified by Article 31—although even under ABC's view, in order for the hiring of temporary employees to be contractually permitted, regular unit employees must be unable to perform the work during regular hours or overtime. The Union, which maintained that a number of unit employees were on layoff, and had pending grievances to that effect, did not accept that Article 31 could be invoked.

Accordingly, in this case, the Union's request for detailed information on the hiring and work of the temporary employees was directly related to contractual claims it was advancing under the collective-bargaining agreement, and to defenses to the claims advanced by ABC, and each party was aware of the other's positions. This is more than adequate to demonstrate the relevance of the requested information to the Union's representational duties. Of course, it is not necessary to agree with the Union's interpretation of the contract, or to believe that there was any violation of the contract, for it to be readily apparent that the details of the transfer of work were relevant to the Union's claim, and thus, to its representational duties. The Union is entitled to request and receive information that substantiates, undercuts, or in any way informs its good faith ef-

forts at contract administration. "The Board need only decide whether the information sought has some 'bearing' on these issues, or would be of use to the union." *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (2006). That is the point of a "liberal discovery-type standard." *Shoppers Food Warehouse*, 315 NLRB at 260 (reversing ALJ's conclusion that "was tantamount to a determination on the merits that the Union did not establish a contract violation. . . . . [T]he Board's discovery-type standard favoring disclosure is intended to facilitate the arbitral process by permitting a union access to a broad scope of potentially useful information"). See also, *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (in information case it is "not for the Board to make a determination on the merits that Union did not establish a contract violation").[17]

Turning to the specifics of the Union's request, information about how and what work was transferred, returned, authorized, the dates it was transferred, the compensation paid, the date and manner in which the temporary employees were contacted, is potentially relevant to understanding the timing of the Respondent's claims about when work was transferred, when the transferred employees were engaged, and what remedies would be appropriate for the alleged contract breach.[18] Information regarding the names, addresses, and other contact information for the temporary employees is obviously designed to permit the Union to contact the temporary employees: a matter squarely relevant to investigating the circumstances of the alleged contract violation.[19] The assessment of the qualifications of the individuals: resumes, applications and notes, and manner in which they came to the Respondent's attention, is relevant for the Union's understanding of how these temporary employees compared to available bargaining unit employees, some of whom the Union claims are on layoff and available and qualified to work.[20] Finally, the request asked for the closest ABC office to each hired temporary employee. This request, boils down to a way of asking, as Morgan explained at the hearing, "if they weren't working out of the facility here for American Benefit what office of American Benefit were they working out of." The location of the work potentially would be relevant to the Union's contention that incumbent or laid off permanent employees were able to perform the work.[21]

Under a liberal discovery-type standard the Union should be able to request, without additional justification, information squarely related to events that are the focus of an articulated contractual dispute between the parties. In this case, that includes information to explore and understand the full the relationship of the Respondent with the temporary employees, the hiring of whom is disputed.

2. Information never provided

Requested information never provided includes information regarding the date ABC contacted the temporary employees. At the hearing, Jones testified that there might be some emails responsive to this request, but he was not sure. Some of the temporary employees phone numbers were included in the

[17] I note that the Board's decision in *Disneyland Park,* 350 NLRB 1257 (2007) refusing to find a violation for an employer's failure to provide subcontracting information is inapposite—instructively so. In that case, the Board found that the relevance of a union's request for subcontracting information had not been adequately supported where, the Board majority reasoned, "pursuant to . . . the collective-bargaining agreement, the Respondent could subcontract, provided that the subcontracting did not result in a termination, layoff or a failure to recall unit employees from layoff. However, the Union made no such claim." 350 NLRB at 1258. Here, of course, the gravamen of the Union's claim—and the focus of the dispute with ABC—is that subcontracting of unit work offsite is, without more, a violation of the collective-bargaining agreement. Although the Union does claim employees were on layoff, the Union's claim that the contract was violated by ABC's conduct is not premised on there being layoffs. (At the same time, ABC's defense to the grievance involves the claim that was no qualified employees on layoff, a defense that further justifies the scope of the Union's information request.) The Union asserts the contractual position that the Respondent's temporary diversion of work—the fact of which is not and never was in dispute—is illegitimate regardless of layoffs in the bargaining unit. The Union here has shown the relevance of the requested information under the test laid down by the majority in *Disneyland*: "[The Union] must demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective bargaining representative." 350 NLRB at 1258. Given that ABC understood, from the grievance and from Bostic's conversations with Morgan, that the Union was broadly challenging the right of ABC to send this work offsite, "the relevance of the information should have been apparent to the Respondent under the circumstances." *Disneyland*, supra at 1258.

[18] This information is also directly relevant to the Respondent's stated defense to the Union's grievance: that, in accordance with Article 31, the transferred work could not be performed during the work day or on overtime by bargaining unit employees. Indeed, at the hearing, the Respondent made much of the employees' refusal to work overtime in early October. Determining the work and overtime circumstances prevailing at the time that the temporary employees were hired is squarely relevant to the determination of the applicability of Article 31, even under ABC's interpretation of Article 31.

[19] Rule 26(b)(1) of the Federal Rules of Civil Procedure—the schema on which the "broad discovery-type standard" followed by the Board is based—specifically provides that the scope of discovery includes "the identity and location of persons who know of any discoverable matter." Thus, the Union's interest in obtaining the names, addresses, and contact information for temporary employees is so plain as to be considered illustrative of the scope of the relevance standard by the authors of the Federal Rules of Civil Procedure.

[20] In addition, as Morgan pointed out at trial, Article 17 of the 2006 Agreement, which is cited in the subcontracting grievance, provides for the local union to be given "equal opportunity with all other sources to provide suitable applicants" for consideration for hire. This provision brings the temporary employees' qualifications directly into issue.

[21] At the hearing, Morgan also expressed concern that the temporary employees were working at some new "double breasted alter ego of American Benefit." While the Board requires a "reasonable belief supported by objective evidence for requesting . . . information" related to the existence of an alter ego operation—and Morgan had no evidence, or even belief, suggesting alter ego—the request is not, on its face, about alter ego. It asks, somewhat incoherently, if they are not working in Huntington, where are they working for American Benefit? In this case the Union knew that the temporary employees were working somewhere else. It is potentially relevant to know what ABC office they were working from. Notably, ABC's limited response to the information response went to some lengths to avoid mentioning where the temporary employees were working, an innocuous piece of information that would have satisfied this request.

information provided in April. Others were not. Information showing which work and claims were sent to employees and when, was not provided in any detail, as requested.[22]

The Respondent should be able to easily identify for the Union the claims worked on by the temporary employees. The failure to provide this relevant and requested information is a violation of the Act. I will order such information be provided as part of the remedy in this case.

The requests asking how the temporary employees were contacted, who contacted them, where they worked, how the work was returned, and who authorized the work, were covered in some depth at the hearing by ABC witnesses. While the failure to provide this requested information constitutes a violation, I shall not order it to be provided anew as part of the remedy in this case. At the hearing it was provided by witnesses under oath, with an opportunity for cross examination. There is nothing more or better that could be provided.

Testimony at the hearing convinces me that the Respondent does not possess any applications or resumes submitted by temporary employees or applicants for such positions. None were submitted. Similarly, I find, based on testimony at the hearing that no interview notes exist. There were no interviews. There is, of course, no duty to provide information that does not exist. Somewhat remarkably, in my estimation, a recent Board majority held that the failure to inform the union that requested information does not exist does not violate the Act, at least where, as here, the General Counsel has not amended the complaint to so allege. *Raley's Supermarkets*, 349 NLRB 26, 28 (2007). Accordingly, I find no violation as to these requested items.[23]

3. Information provided after a delay

In response to the Union's November 19 information request, Bostic initially responded by letter dated November 25. In that letter Bostic indicated, without explanation, that ABC thought many of the requests were "overly broad and seek irrelevant information." However, the letter also indicated that ABC was "assessing these requests and will respond to your requests in writing by December 5."

In the December 5 letter, received by Morgan December 8, Bostic continued to maintain that the Union's information request was "overly broad and seeks information that is not relevant." However, in her letter and its attachment, Bostic provided some information responsive to the Union's information request.

The hours worked, rate of hourly compensation, information about the (lack of) benefits, and paid compensation for temporary employees performing dental claims work was provided. This was also provided for the two employees performing medical claims work. Information responsive to request 7 was included in the December 5 letter, explaining that the dental employees worked on paper claims and the medical employees worked electronically. ABC also provided the date the work was sent to the temporary dental claims employees. Also responsive, ABC stated the date the dental claims work was returned to the Huntington office.

After Morgan received Bostic's letter and the attachment, he responded to Bostic with a letter, dated December 9, challenging Bostic to "specifically identify which requests for information the company deems to be overly broad and/or irrelevant and the basis for those objections."

Bostic did not respond, and no further information was provided until April 24, four days before the hearing in this matter. At that time, ABC's counsel provided Union counsel with additional information, including an array of payroll records, W-2 forms, timesheets, direct deposit authorizations, and voided checks for the temporary employees. There were also a few emails where the temporary employees performing medical claims listed their hours. This gave the Union names, addresses, some phone numbers, and a significant amount of information on the temporary employees' work hours and pay.

No excuse or explanation—either through testimony or in counsel's brief—was offered by the Respondent for the five month delay in providing this information.[24] All of the information provided in April 2009 appears to be information that ABC

[22] I note that the Union's request number 10 asked for information showing which written claims were removed from employees desks on or about October 11 and sent to temporary employees. By all evidence, the written "hard copy" dental claims were removed on October 17, and not from employees' desks, but from cabinets where the claims had been stored. However, the information request must be considered in context, and "the adequacy of a union's request for information must be judged in light of 'the entire pattern of facts available to the (employer)' not just the bare words of the request itself." *Gloversville Embossing Corp.*, 314 NLRB 1258 (1994) (condemning incomplete response based on alleged misreading of request for information), quoting *Ohio Power Co.*, 216 NLRB 987, 990 (1975). To its credit, the Respondent does not contend that its failure to respond to request number 10 was based on a misunderstanding of the information sought by the Union. The exchanges between Morgan and Bostic, as well as the entire 11-paragraph information request, made it clear to the Respondent that the Union was interested in the information about the claims removed October 17. I find that "the Union's request, taken in context, unambiguously informed the Respondent of the specific information the Union desired." *Gloversville Embossing Corp.*, 314 NLRB at 1259.

[23] In *Raley's*, the dissent explained:

> [t]he notion that an employer's failure timely to indicate that it lacks requested information is somehow distinguishable from a failure to provide available information does a disservice to the Act. The purpose of the Act's requirement that parties provide each other with relevant information is to maximize *communication* between them and so minimize industrial strife. For this purpose, it is elementary that parties must not only provide requested information, but also timely inform each other when they have none to provide. The failure to do either is obviously a violation of the duty to provide relevant information.

349 NLRB at 30 (original emphasis).

[24] On brief, the Respondent repeatedly contends (R. Br. at 17, 18, 22) that the Union was not prejudiced by the delay in providing information. This is not an explanation, and not a defense, and prejudice is not part of the General Counsel's burden in proving a violation. However, I reject the premise. The Respondent can only speculate on the course of events had it timely provided the requested information as required by the Act. Neither an employer nor union, faced with a relevant request for information, is free to refuse to comply with the request so long as *it* believes that there is no prejudice to the requesting party. Such an arrogation of the right to control the flow of information would be recipe for a breakdown in the collective bargaining system and for increased labor relations strife; consequences inimical to the purposes of the Act.

would have possessed in November 2008 when the request was made, or within a few days. As discussed, supra, it is axiomatic that, like a refusal to provide information, an unreasonable delay in providing requested relevant information is also violative of the Act. This five month delay was unreasonable and a violation of the Act.[25]

CONCLUSIONS OF LAW

1. The Respondent American Benefit Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Teamsters Local Union No. 505 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's employees:

> all employees employed by the Employer at its Huntington, West Virginia location, but excluding all managerial employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally transferring bargaining unit work to offsite temporary nonbargaining unit employees on or about October 18, 2008, without notifying the Union or providing the opportunity to bargain.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide information requested by the Union and relevant to the Union's representational duties.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of information requested by the Union and relevant to the Union's representational duties.

7. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall provide the Union with information that it has to date failed and refused to provide that was requested by the Union in its November 19, 2008 information request to the Respondent, as identified in the decision in this matter, including, information regarding the date ABC contacted the temporary employees, phone numbers for temporary employees not yet provided, information showing which work was sent to temporary employees and when that work was sent.

The Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of the Respondent's unlawful unilateral transfer of bargaining unit work in October and November 2008 to offsite temporary employees. All payments to employees are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) as well as *F.W. Woolworth Co*., 90 NLRB 289 (1950), as appropriate,[26] with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall reimburse the Union, with interest, for dues, if any, it would have withheld and transmitted under the collective-bargaining agreement, in the absence of its unlawful unilateral change, such sums to be calculated in the manner set forth in Ogle Protection Service, supra. Interest on all such sums shall be computed as prescribed in accordance with New Horizons for the Retarded, supra.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 2008.

The Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[25] The complaint alleges a failure to provide requested information—not a failure to timely provide information. However, the Board does not require separate complaint allegations to cover these closely related violations. *Care Manor of Farmington*, 318 NLRB 330 (1995). In any event, the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). In this case both prongs of this test are met with regard to the delay in providing information. The delayed information includes the very same information that—at the time of the complaint's issuance—had not been provided and was alleged in the complaint to have not been provided. The only change was the Respondent's decision, four days before trial, to provide some of the information in dispute to the Union. Thus, the allegation is "closely connected" to the pled 8(a)(5) case. The "determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament*, supra at 335. In this case, the claim of delay was fully litigated because the evidence is the same as the alleged refusal to provide information, except that some of the information was provided on April 24, 2009. There is no factual dispute on any relevant point.

[26] The *Ogle Protection* formula applies in cases when the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle*, supra at 683. The *Woolworth* formula is otherwise appropriate in backpay cases. In this case, the backpay remedy may involve either type of backpay remedy, or both, depending on who is found to have suffered losses on account of the Respondent's conduct. That determination is appropriate for resolution in a compliance hearing.

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent American Benefit Corporation, Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by transferring bargaining unit work to offsite temporary employees without providing the Union notice and an opportunity to bargain.

(b) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by failing and refusing to provide information requested by the Union that is relevant and necessary to the Union's representational duties.

(c) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by delaying the furnishing of information requested by the Union that is relevant and necessary for the Union's representational duties.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral transfer of bargaining unit work to offsite temporary employees that occurred during the months of October and November 2008.

(b) Reimburse the Union, with interest, in the manner set forth in the remedy section of this Decision and Order, for any dues it would have been required to withhold and transmit under the collective-bargaining agreement, had it not unilaterally transferred bargaining unit work to offsite temporary employees during the months of October and November 2008.

(c) Provide the Union with information that it has to date failed and refused to provide that was requested by the Union in its November 19, 2008 information request to the Respondent, including information regarding the date ABC contacted the temporary employees, phone numbers for temporary employees not yet provided, information showing which work was sent to temporary employees and when that work was sent.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since October 18, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C., July 2, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT unilaterally transfer bargaining unit work to offsite temporary employees without providing the Union notice and an opportunity to bargain.

WE WILL NOT fail or refuse to provide the Union with information it requests that is relevant to the Union's representational duties.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT delay in furnishing the Union with information it requests that is relevant to the Union's representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL make employees whole for any loss of earnings, with interest, incurred because of our unilateral transfer of bargaining unit work to offsite temporary employees in October and November 2008.

WE WILL reimburse the Union with interest for any dues we would have been required to withhold and transmit under the collective-bargaining agreement, had we not unilaterally transferred bargaining unit work to offsite temporary employees during the months of October and November 2008.

WE WILL, provide the Union with information that we have to date failed and refused to provide that was requested by the Union in its November 19, 2008 information request, including information regarding the date ABC contacted the temporary employees, phone numbers for temporary employees not yet provided, information showing which work was sent to temporary employees and when that work was sent.

AMERICAN BENEFIT CORP.